New York v. United States:[1] A New Restriction on Congressional Power vis-à-vis the States?

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I. INTRODUCTION

Since the birth of the United States, the question regarding the scope of congressional power has been much debated and litigated.[2] Until relatively recently, the main thrust of this debate has been the limits of Congress' enumerated powers, especially under the Commerce Clause.[3] In the late 1930s and early 1940s, several important Supreme Court decisions[4] rendered this debate essentially moot. From 1937 until present, the Supreme Court has interpreted the Commerce Clause as a plenary grant of power to Congress, subject only to other constitutional restraints. The Supreme Court's 1975 decision in *National League of Cities v. Usery*[5] rekindled the debate by holding that the Tenth Amendment provides an external limit on congressional power to regulate the states as states.[6] However, this Court-imposed limit on congressional power was short lived. In 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*,[7] the Court overruled *National League of Cities* in holding that there was no judicial role in supervising the scope of the federal commerce power as it applied to state and local governments.[8]

It is against this backdrop that the Court, in 1992, decided the case of *New York v. United States*.[9] In *New York*, the Court again revitalized the debate by finding a very limited restriction on congressional power under the Commerce

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[1] 112 S. Ct. 2408 (1992).

[2] *See, e.g.*, Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447 (1987). The question in this regard was whether Congress should legislate for the states in their corporate capacity or whether Congress should legislate for the people.

[3] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that the commerce power does not extend to the regulation of wages, hours, and working conditions of coal miners); Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding that Congress has no power to prohibit interstate transportation of goods produced with child labor); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that the commerce power includes the power to regulate transportation on interstate waterways).

[4] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[5] 426 U.S. 833 (1976).

[6] *Id.* at 852.

[7] 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985).

[8] *Id.* at 551.

[9] 112 S. Ct. 2408 (1992).

Clause.[10]

In one sense this case is extraordinary because it is only the third time since 1936 that the Court has found legislation enacted by Congress under its Commerce Clause power to be unconstitutional.[11] However, the Court's opinion leaves much doubt as to the application of this restriction in the future. First, Justice O'Connor, writing for the Court, drew a very thin line between permissible and impermissible legislation.[12] Second, it is arguable that the case was not well grounded in law The *New York* Court found that the *National League of Cities/Garcia* line of cases was inapplicable,[13] choosing instead to base its decision on arguably weak precedent and incomplete historical analysis.[14] Due to these limitations, it is possible that the restriction is so narrow that its application may be limited to the particular provision in question.[15] Future application will depend to a very large extent on how broadly the Court wishes to construe its decision.

This Comment will concentrate on the federalism and state sovereignty issues raised by this case.[16] In Part II, this Comment will examine the factual background and the litigation leading to the Supreme Court's decision. Next, Part III will briefly discuss the intellectual and judicial treatment of the Tenth Amendment as an external limit on congressional power. In Part IV, this Comment will discuss the framework that the Court builds and will analyze the Court's opinion based on this framework. Part V will offer a critique of the Court's decision. Finally, in Part VI, this Comment will examine the possible ramifications of the Court's decision and its possible application in the future.

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[10] The Court found one provision of the Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021b–2021j (1988), to be unconstitutional. *New York*, 112 S. Ct. at 2429. This will be discussed more fully *infra* Part IV.B.3.

[11] *See* William W Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1713 (1985). The only other such decisions were in National League of Cities v. Usery, 426 U.S. 833 (1976), discussed in more detail *infra* Part III.A, and Oregon v. Mitchell, 400 U.S. 112 (1970), which was superseded by the Twenty-Sixth Amendment. *Id.*

[12] *See New York*, 112 S. Ct. at 2425–29. This will be discussed more fully *infra* Part IV.A.

[13] *New York*, 112 S. Ct. at 2420.

[14] *See id.* at 2441 (White, J., dissenting).

[15] Justice O'Connor notes that the provision in question appears to be unique and that no other federal statute was cited to which the restriction would apply. *Id.* at 2429.

[16] Several other interesting issues, beyond the scope of this paper, are raised in this case. For example, the respondents raised an interesting question concerning the Compact Clause of the United States Constitution. The Court did not expressly address this argument. However, the major thrust of Justice White's dissent is based on the argument that the Act is constitutional as an agreement between the states which is authorized by Congress under its Compact Clause power. *Id.* at 2439–40 (White, J., dissenting).

II. *NEW YORK V. UNITED STATES*: THE FACTUAL BACKGROUND

In *New York*, the Court addressed the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Act of 1985 (Act).[17] The Act was a response to a crisis of available disposal sites for low-level radioactive waste and was based largely on a proposal submitted by the National Governor's Association.[18] In essence, the Act directs that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste . . . ."[19] States are authorized under the Act to provide their own in-state disposal site or to enter into compacts with other states for the purpose of developing regional disposal sites.[20] The Act provides three sets of incentives to encourage states to comply with this statutory obligation,[21] and it is these incentive provisions that the State of New York and several of its political subdivisions challenged on constitutional grounds.

The first incentive of the Act provides that a portion of the surcharge (that states with disposal sites were permitted to charge on waste coming from an unsited state) must be transferred to an escrow account.[22] Payments are made from this account to each state that has complied with a series of deadlines leading to the development of disposal sites in the state or regional compact.[23]

The second incentive provision involves access to existing disposal sites.[24] "Sited states are authorized to charge two to four times the ordinary surcharge on waste generated in states that fail to meet the deadlines. Subsequent failure

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[17] 42 U.S.C. § 2021b–2021.

[18] *New York*, 112 S. Ct. at 2415. There is a great deal of evidence that the State of New York assented to this agreement. *Id.* at 2438–40 (White, J., dissenting).

[19] 42 U.S.C. § 2021c(a)(1)(A).

[20] 42 U.S.C. § 2021d(a)(2).

[21] *New York*, 112 S. Ct. at 2416.

[22] 42 U.S.C. § 2021e(d)(2)(A).

[23] *New York*, 112 S. Ct. at 2416. These deadlines included the following: (1) the adoption of legislation either joining a regional compact or indicating an intent to develop an in-state site (42 U.S.C. §§ 2021e(d)(2)(B)(i), 2021e(e)(1)(A)); (2) indication of where the facility was to be located and the development of a siting plan (42 U.S.C. §§ 2021 e(d)(2)(B)(ii), 2021e(e)(1)(B)); (3) the completion of an application for a license to operate a disposal facility, or certification by the governor of a state that the state would be capable of disposing of all waste generated within the state (42 U.S.C. §§ 2021e(d)(2)(B)(iii), 2021e(e)(1)(C)); and (4) the ability of the state or compact to dispose of all of the waste generated within its borders (42 U.S.C. § 2021e(d)(2)(B)(iv)). *New York*, 112 S. Ct. at 2416.

[24] *New York*, 112 S. Ct. at 2416.

to meet the first deadline could result in a complete denial of access to disposal facilities."[25]

The third incentive provision contains the most severe sanction for any state that fails to provide for the disposal of low-level radioactive waste generated within its borders.[26] The Act provides as follows:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.[27]

The petitioners in this case (the State of New York and Cortland and Allegheny Counties) filed suit against the United States seeking a declaratory judgment that the incentive provisions of the Act violated the Tenth Amendment of the United States Constitution.[28] The district court dismissed the claim, finding that the Supreme Court's decision in *Garcia* permitted judicial interdiction of federal power over the states only (1) when that power is the result of a defect in the political process, or (2) when equality among the states has been jeopardized.[29] The court found neither of these conditions to be present.[30]

The Second Circuit affirmed. The circuit court found that "[w]ith rare exceptions, . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."[31]

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[25] 42 U.S.C. § 2021e(e)(2)(A)–2021e(e)(2)(D). See *supra* note 23 for a description of the deadlines.

[26] *New York*, 112 S. Ct. at 2416.

[27] 42 U.S.C. § 2021e(d)(2)(C).

[28] *New York*, 112 S. Ct. at 2417. Petitioners also sought to have the provisions declared inconsistent with the Eleventh Amendment, the Due Process Clause of the Fifth Amendment, and the Guaranty Clause. Petitioners later abandoned their Eleventh Amendment and Fifth Amendment challenges. *Id.* The Court found that the incentive provisions did not violate the Guaranty Clause. *Id.* at 2433. However, discussion of the Guaranty Clause is beyond the scope of this Comment.

[29] New York v. United States, 757 F. Supp. 10, 12 (N.D.N.Y. 1990), *aff'd*, 942 F.2d 114 (2d Cir. 1991), *aff'd in part, rev'd in part*, 112 S. Ct. 2408 (1992).

[30] *Id.* at 12–13. The court did note the possibility that the *Garcia* doctrine would not survive and indicated that this may be the case that overturns *Garcia*. *Id.* at 13.

[31] New York v. United States, 942 F.2d 114, 119 (2d Cir. 1991) (quoting *Garcia*, 469

Noting that a defect in the political process was the principal exception referred to in *Garcia*, the court found that such a defect did not exist.[32] The Supreme Court granted certiorari.[33]

III. THE TENTH AMENDMENT AS AN EXTERNAL LIMIT ON CONGRESSIONAL POWER VIS-À-VIS THE STATES

A. *The Historic Interpretation of the Tenth Amendment*

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[34] The language of the Tenth Amendment in essence states a truism on which our federal system is based—that any power not delegated to the federal government is reserved to the states. Read literally, it is difficult to find an affirmative limitation on congressional power in the Tenth Amendment.

Most courts and scholars have, in fact, concluded that the Tenth Amendment is merely tautological and provides no external constitutional limitation on congressional power. In *United States v. Darby*,[35] the Supreme Court found that

> [t]he amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[36]

Justice Story noted that the Tenth Amendment

> is a mere affirmation of what . . . is a necessary rule of interpreting the Constitution. Being an instrument of limited and enumerated powers, it follows . . that what is not conferred is withheld, and belongs to the State authorities if invested . . in them; and if not so invested, it is retained BY THE PEOPLE, as

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U.S. at 550), *aff'd in part, rev'd in part*, 112 S. Ct. 2408 (1992).

[32] *Id.*

[33] New York v. United States, 112 S. Ct. 856 (1992).

[34] U.S. CONST. amend. X.

[35] 312 U.S. 100 (1941).

[36] *Id.* at 124.

a part of their residuary sovereignty.[37]

B. *The Supreme Court's Application of the Tenth Amendment to Federal Regulation of State Activity*

The Court had several opportunities to review federal regulation of state activity between 1936 and 1976—many based on Tenth Amendment challenges—and each time found the challenged regulation to be within the scope of federal power.[38] However, in 1976, the Court in *National League of Cities v. Usery*[39] held that the minimum wage and overtime provisions of the Fair Labor Standards Act could not be applied to the employees of state governments.[40] The Court found that the effect of the Act, as sought to be extended to the states and their political subdivisions, would "impermissibly interfere with the integral governmental functions of these bodies."[41] The Court further found that the contemplated exercise of congressional power did not "comport with the federal system of government embodied in the Constitution."[42] In addition, the Court, in overruling *Wirtz*, held that Congress

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[37] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1907, at 652 (Boston, Little Brown 5th ed. 1891); *see also* Walter Berns, *The Meaning of the Tenth Amendment*, *in* A NATION OF STATES 126, 131–32 (Robert A. Goldwin ed., 1961). Berns states that the Tenth Amendment

> is not a rule of the law of the Constitution, which is to say that no court can base its holding in any case on the Amendment because the Amendment does not contain terms that can provide a rule of law.
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> The Tenth Amendment contains no terms that the courts can use to settle any legal case or controversy.

Id. But see Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (stating that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."); RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 84 (1987) ("Why does not the express reservation of undelegated powers . . . furnish the 'terms' of constitutional adjudication?").

[38] *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968) (upholding the application of federal minimum wage requirements to employees of state and local government institutions); United States v. California, 297 U.S. 175 (1936) (upholding the application of statutes setting railroad safety, labor relations, and employer liability requirements for railroad companies owned by state governments).

[39] 426 U.S. 833 (1976).

[40] *Id.*

[41] *Id.* at 851.

[42] *Id.* at 852.

may not exercise its power to regulate commerce to force upon the states its own "choices as to how decisions regarding the conduct of integral governmental functions are to be made."[43]

However, the scope of the Court's decision in *National League of Cities* proved to be quite narrow In the nine years following *National League of Cities*, the Court found no occasion to hold any federal law inapplicable to the states because it impermissibly interfered with their integral governmental functions. Indeed, the Court struggled in defining the scope of governmental functions protected under *National League of Cities*.[44]

In 1985, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[45] The Court rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"[46] In holding that no provision in the overtime and minimum wage requirements of the Fair Labor Standards Act was destructive of state sovereignty or violative of any constitutional provision,[47] the Court found that

> the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests . . . are more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[48]

The Court concluded that any substantive restraint on the exercise of congressional power under the Commerce Clause would be justified only if it were narrowly tailored to compensate for possible defects in the federal political process, and not to dictate a "'sacred province of state autonomy.'"[49]

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[43] *Id.* at 855.

[44] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985).

[45] 469 U.S. 528 (1985).

[46] *Id.* at 546–47

[47] *Id.* at 554.

[48] *Id.* at 552.

[49] *Id.* at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)); *see also* South Carolina v. Baker, 485 U.S. 505, 512–13 (1988). In *Baker*, the Court found that the Tenth Amendment limits on congressional power are "structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity. . . . Where . . . the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Id.* at 512–13. The *Baker* Court specifically declined to identify or define

IV. THE COURT'S DECISION IN *NEW YORK v. UNITED STATES*

A. *The Court's Conceptual Framework*

It is against the backdrop discussed in the preceding section that the Court decided the case of *New York v. United States*. In writing for the Court, Justice O'Connor first discussed the limitations imposed on congressional power. She found that regardless of how the inquiry is phrased—either (1) whether an Act of Congress is authorized by one of the powers enumerated in Article I, or (2) whether an Act of Congress invades the state sovereignty reserved by the Tenth Amendment—the two inquiries are "mirror images of each other" in cases, such as this, involving the division of authority between federal and state governments.[50]

In discussing the Tenth Amendment, Justice O'Connor first noted that the Amendment in a sense "states but a truism that all is retained which has not been surrendered."[51] However, while conceding that the text of the Tenth Amendment itself is essentially a tautology, Justice O'Connor found that it "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."[52] She further noted that, in this case, the Tenth Amendment directed the Court to determine "whether an incident of state sovereignty is protected by a limitation on an Article I power."[53]

Justice O'Connor next dispensed with the problem of overcoming the Court's prior Tenth Amendment precedent established in *Garcia*.[54] First, she noted that the *Garcia* line of cases concerned the power of Congress to subject state governments to generally applicable laws.[55] Justice O'Connor then found

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what type of defect in the political process might lead to such invalidation. *Id.* at 512.

[50] New York v. United States, 112 S. Ct. 2408, 2417 (1992).

[51] *Id.* at 2418 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

[52] *Id.* This dictum is contrary to the *Garcia* decision in which the Court held that the Tenth Amendment does not contain any substantive limitations on congressional power. *See supra* note 48 and accompanying text.

[53] *New York*, 112 S. Ct. at 2420. Justice O'Connor does not explain how, on the one hand, the Tenth Amendment states but a truism that all power that is not granted to Congress is retained by the states, *see supra* note 51 and accompanying text, and, how, on the other hand, an incident of state sovereignty can be protected by the Tenth Amendment as a limitation on Congress's Article I power. These two statements appear clearly inconsistent.

[54] *See supra* notes 45–49 and accompanying text.

[55] *New York*, 112 S. Ct. at 2420.

that "[t]his case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."[56] Instead, she found that this case "concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way."[57]

Having dispensed with the precedent upon which the lower court decisions were based,[58] Justice O'Connor found it necessary to construct a conceptual framework upon which to base the Court's decision. Relying on dicta from two pre-*Garcia* cases, Justice O'Connor found that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[59] She noted further that the Court never explicitly sanctioned a federal command to enact and enforce regulations.[60]

Justice O'Connor noted that these statements were not innovations; while acknowledging that Congress has the power to directly govern the nation, she found that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[61] To support this framework, Justice O'Connor discussed in some detail the debates at the Constitutional Convention concerning the appropriate scope of federal power vis-à-vis the states.[62] These debates centered to a large extent on the issue of whether Congress should legislate through the states and with the states' approval—as had been the case under the Articles of Confederation—or whether Congress should exercise its legislative authority directly on the people, without using the states as intermediaries. The Convention eventually opted for a Constitution in which Congress would not exercise its legislative authority over the states, but rather, directly over the people.[63] Justice O'Connor concluded that

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[56] *Id.*

[57] *Id.* In a scathing dissent, Justice White strongly criticized this distinction, finding that it was unsupported by the Court's recent Tenth Amendment precedent and noting that "one would be hard-pressed to read the spirited exchanges between the Court and dissenting Justices" in *National League of Cities* and *Garcia* as having been based on the distinction between laws of general applicability as opposed to regulations directed solely at the states. *Id.* at 2441 (White, J., dissenting).

[58] *See supra* notes 29–32 and accompanying text.

[59] *New York*, 112 S. Ct. at 2420 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) (alteration in original).

[60] *Id.* (citing FERC v. Mississippi, 456 U.S. 742, 761–62 (1982)).

[61] *Id.* at 2421 (citing Coyle v. Oklahoma, 221 U.S. 559, 565 (1911)).

[62] *Id.* at 2421–23.

[63] *Id.* at 2422; *see generally* RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max

> the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. . [T]he Court has consistently respected this choice. . . [E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.[64]

Having determined that Congress cannot directly compel the states to act, Justice O'Connor noted two methods by which Congress may encourage states to regulate in a particular way or hold out incentives in order to influence states' policy choices. Justice O'Connor first noted that Congress may condition the receipt of federal funds under its spending power.[65] Next, she noted that "where Congress has the authority to regulate private activity under the Commerce Clause, [the Court has] recognized Congress' power to offer states the choice of regulating that activity according to federal standards or having state law pre-empted [sic] by federal regulation."[66] Justice O'Connor found that both of these methods were permissible because, in either case, the ultimate decision as to whether or not the state will comply with the federal policy is retained by the residents of the individual states.[67]

B. *The Court's Analysis of the Low-Level Radioactive Waste Policy Amendments Act of 1985*

The Court next analyzed the challenged provisions of the Low-Level Radioactive Waste Policy Act of 1985 based on the framework described in Part III.A. The Act begins by instructing that "[e]ach State shall be responsible for providing . for the disposal of . low-level radioactive waste."[68] As a preliminary matter, the Court declined to construe this provision alone as a

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Farrand ed., 1911).

[64] *New York*, 112 S. Ct. at 2423 (citations omitted).

[65] *Id.* (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)). In *Dole*, the Court found that this spending power is not unlimited, but is subject to several restrictions: (1) the exercise must be in the pursuit of the general welfare; (2) the conditioning of the states' receipt of funds must be unambiguous; (3) the conditions must be related to the federal interest in particular federal projects or programs; and (4) the conditions must not be inconsistent with other constitutional limitations. *Dole*, 483 U.S. at 207-08 (citations omitted).

[66] *New York*, 112 S. Ct. at 2424 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981); FERC v. Mississippi, 456 U.S. 742, 764-65 (1982)).

[67] *Id.*

[68] 42 U.S.C. § 2021c(a)(1)(A).

command to the states independent of the rest of the Act.[69] Instead, the Court found that "[c]onstrued as a whole, the Act comprises three sets of 'incentives' for the States to provide for the disposal of low level radioactive waste generated within their borders"[70] and considered each incentive provision independently.

1. *The "Monetary Incentives"*

The Court first considered the "monetary incentives,"[71] which work in three steps. The Court found the first step, congressional authorization for the states with disposal sites to impose a surcharge on waste generated in other states, to be an unexceptional exercise of congressional power to authorize states to burden interstate commerce.[72] The Court found the second step, the collection of a portion of this surcharge that was placed in escrow, to be no more than a federal tax on interstate commerce.[73] The Court found the third step, in which states received a portion of this escrow account upon achieving a series of milestones, to be a conditional exercise of congressional authority under the Spending Clause.[74] In addition, the Court rejected the petitioner's argument that these payments are beyond the scope of the Spending Clause because the funds are held by the Secretary of Energy as a trustee and because the states, to a large extent, are able to determine whether they will pay into the account or pay a share. The Court found that "[a] great deal of federal spending comes from segregated trust funds collected and spent for a particular purpose" and that "[t]he Spending Clause has never been construed to deprive Congress of the power to structure federal spending in this manner."[75] The Court concluded that the monetary incentives were not inconsistent with the Tenth Amendment because they were authorized by an affirmative

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[69] *New York*, 112 S. Ct. at 2425. The Court rejected this interpretation for two reasons. First, the Court found that such an interpretation would upset the balance between federal and state powers provided for in the Constitution. *Id.* (citing Gregory v. Ashcroft, 111 S. Ct. 2395, 2401 (1991)). Second, the Court chose an alternative construction of the statute that would avoid constitutional infirmity. The Court found that this construction was not plainly contrary to congressional intent. *Id.* (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

[70] *Id.*

[71] *See supra* notes 22–23 and accompanying text.

[72] *New York*, 112 S. Ct. at 2425. The Court noted that, while the states' ability to burden interstate commerce is limited by the Commerce Clause, that limit may be lifted by Congress. *Id.* at 2425–26.

[73] *Id.* at 2426.

[74] *Id.*

[75] *Id.*

constitutional grant of power to Congress.[76]

2. *The "Access Incentives"*

The Court next analyzed the "access incentives,"[77] in which Congress authorized the sited states to gradually increase the cost of access to the sites to waste generated in states that had not achieved certain milestones, and eventually to deny access to such waste altogether.[78] First, the Court noted that this authorization to sited states was within Congress's power to authorize states to discriminate against interstate commerce.[79] The Court then noted that when federal regulation of private activity was within the scope of the Commerce Clause,[80] Congress has the power "to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[81] In this case, the states had the choice of either regulating according to federal standards by attaining self-sufficiency in the disposal of radioactive waste or subjecting their residents who produce radioactive waste to the sanctions of the access incentives. The Court found that this choice did not compel states to regulate because the burden for failure to regulate fell on those who generated the waste and not on the state as a sovereign.[82] The Court held that the access incentives did not intrude on state sovereignty reserved by the Tenth Amendment because the authorization represents a conditional exercise of congressional power under the Commerce Clause "along the lines of those [the Court has] held to be within Congress's authority."[83]

3. *The "Take Title" Provision*

The Court next addressed the "take title" provision,[84] which offers states the choice of taking title of, and assuming the liabilities for, radioactive waste

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[76] *Id.* at 2427

[77] *See supra* notes 24–25 and accompanying text.

[78] *New York*, 112 S. Ct. at 2427.

[79] *See supra* note 72.

[80] At no time did petitioners raise the argument that regulation of radioactive waste disposal was outside the scope of the Commerce Clause. The Court recognized that federal regulation of radioactive waste is clearly within the scope of congressional power. *New York*, 112 S. Ct. at 2425.

[81] *Id.* at 2427 (citations omitted).

[82] *Id.*

[83] *Id.*

[84] *See supra* notes 26–27 and accompanying text.

generated within their borders rather than regulating pursuant to congressional direction.[85] The Court found that this provision "crossed the line distinguishing encouragement from coercion" because it offered state governments a choice of alternatives, each of which would be constitutionally impermissible standing alone.[86] The Court first found that requiring states to take title to radioactive waste, standing alone, "would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers."[87] Similarly, the provision requiring states to become liable for the waste producers' damages "would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents."[88] The Court concluded that either of these actions would commandeer state governments into the service of the federal government and would therefore be inconsistent with the Constitution's division of authority between federal and state governments.[89]

The Court next found that the other alternative offered to states—regulating according to the instructions of Congress—would, standing alone, be nothing more than a simple command to state governments to implement congressional legislation. The Court noted that "the Constitution does not empower Congress to subject state governments to this type of instruction."[90]

The Court found that because either alternative, standing alone, would be beyond the authority of Congress, "it follows that Congress lacks the power to offer the States a choice between the two."[91] The Court distinguished the first two sets of incentives because they represented conditional exercises of a congressional power enumerated in the Constitution. However, the "take title" provision merely holds out the threat that if the states fail to regulate according to one federal instruction, they will be subjected to another.[92] "Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[93] The Court concluded that the "take title" provision is "inconsistent with the federal structure of our Government established by the Constitution."[94]

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[85] *New York*, 112 S. Ct. at 2427.

[86] *Id.* at 2428.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* In coming to this conclusion, the Court relied on the conceptual framework that it had developed earlier in the opinion. *See supra* notes 59–67 and accompanying text.

[91] *New York*, 112 S. Ct. at 2428.

[92] *Id.*

[93] *Id.* (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

[94] *Id.* at 2429. The Court, however, declined to specify whether this provision was

V. CRITIQUE OF THE COURT'S DECISION

Professor Herbert Wechsler noted that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress."[95] For this reason, when the Court decides to venture into this area, one would hope that the Court's opinion would be well reasoned and based on sound precedent. Unfortunately, that is not so in this case.

A. *The Failure of the Court to Address Prior Precedent*

Possibly the most troubling aspect of the Court's decision was its failure to adequately address prior Supreme Court precedent as embodied in the *Garcia* line of cases. In *Garcia*[96] the Court held that, within certain narrow limitations, the states' role in the federal system is protected, not by any external limits on Congress's Commerce Clause power, but by the political process.[97] The *New York* Court, however, without acknowledging *Garcia*, concluded that the Tenth Amendment, in certain instances, limited the power of the federal government and reserved power to the states.[98] The Court then declined to apply or revisit the holding in *Garcia* because it dealt with legislation applicable to both private parties and states as opposed to legislation applicable only to states.[99]

The Court's distinction, however, is unpersuasive. Nothing in the text of *Garcia* and its progeny supports such a distinction.[100] While it is not unusual for courts to limit a decision to its facts, the Court made no attempt to justify doing so in this case. This failure is particularly troublesome due to the very broad language used by the *Garcia* Court. Justice White noted, with some force, that "[a]n incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that 'commands' specific action also applies to private parties. The alleged diminution in state authority over its

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outside the scope of Congress's enumerated powers under the Commerce Clause or whether it infringed upon the core of state sovereignty reserved by the Tenth Amendment. *Id.*

[95] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

[96] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[97] *Id.* at 553. *See supra* notes 45–49 and accompanying text.

[98] *New York*, 112 S. Ct. at 2418. *See supra* notes 50–53 and accompanying text.

[99] *New York*, 112 S. Ct. at 2420. *See supra* notes 54–57 and accompanying text.

[100] *See id.* at 2441 (White, J., dissenting).

own affairs is not any less because the federal mandate restricts the activities of private parties."[101]

However, there is a good argument—unarticulated by the Court—for a different treatment of cases, such as *New York*, when Congress attempts to commandeer the legislative process of the states. If federal legislation is applied to both private citizens and the states, the electorate is generally aware (or at least can become aware with less difficulty) that the federal government is the source of the legislation.[102] If the electorate is dissatisfied with particular legislation, it can express this dissatisfaction through the political process. However, when the federal government commands the states to regulate, the source of the regulation becomes much more difficult to determine. In cases such as this, the state officials will likely bear the brunt of the electorate's dissatisfaction, while Congress, the body ultimately responsible for the regulation, is shielded from accountability. "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate. . . ."[103]

In addition, the Court could have advanced this argument as consistent with *Garcia*. The *Garcia* Court recognized that substantive restrictions on congressional authority may be appropriate when the national political process has failed.[104] Lack of congressional accountability is, at least to an extent, a failure of the national political process. The electorate is not adequately able to protect its interests if it is unaware of which political body is ultimately responsible for regulation. The majority in *Garcia* would probably not have accepted this argument as a failure of the political process. However, it appears that this argument is more legitimate than totally dismissing *Garcia* as inapplicable.

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[101] *Id.*

[102] It must be admitted that this statement is an assumption. However, this assumption is true at least in the context of *Garcia*. That case involved the minimum wage and hour provisions of the Fair Labor Standards Act. Employers are required to conspicuously post these provisions in the work place, and it is apparent on the face of these provisions that they are enacted by the federal government.

[103] *New York*, 112 S. Ct. at 2424. The Court, however, failed to advance this argument as justification for the distinction that it created between this case and the *National League of Cities/Garcia* line of cases.

[104] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985). The Court, however, did not specify what types of failures of the national political process would suffice to justify such substantive restrictions.

B. *The Court's Finding That the "Take Title" Provision is Unconstitutional*

The Court held that the "take title" provision was unconstitutional because it offered state governments two impermissible alternatives: (1) regulating according to the instructions of Congress, or (2) accepting title to and assuming liability for radioactive waste generated within their borders.[105] However, the Court's arguments concerning both of these alternatives are unpersuasive.

1. *Regulating According to the Instructions of Congress*

As noted in Part III, the Court developed a framework based on precedent and history to find that Congress could not commandeer the state legislative process.[106] Unfortunately, this framework is for the most part, built on a foundation of sand.

First, the cases that the Court relied on are not persuasive. Citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[107] the Court found that, "[a]s an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[108] However, this foundation block in the Court's framework is merely dicta and was not necessary to the decision in Hodel.[109] The Court also relied on *FERC v. Mississippi*,[110] finding that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations."[111] However, Justice White persuasively criticized the use of this passage on two grounds. First, he found that

> the Court extracts from the relevant passage in a manner that subtly alters the Court's meaning. In full, the passage reads: "While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions."[112]

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[105] *New York*, 112 S. Ct. at 2428. *See supra* notes 84–94 and accompanying text.

[106] *New York*, 112 S. Ct. at 2420–23. *See supra* notes 58–67 and accompanying text.

[107] 452 U.S. 264 (1981).

[108] *New York*, 112 S. Ct. at 2420 (quoting *Hodel*, 452 U.S. at 288) (second alteration in original).

[109] *Id.* at 2442 (White, J., dissenting).

[110] 456 U.S. 742 (1982).

[111] *Id.* at 761–62.

[112] *New York*, 112 S. Ct. at 2442 (White J., dissenting) (quoting *FERC*, 456 U.S. at

Read in context, this statement does not support the Court's proposition. In addition, Justice White noted that the fact that the Court had not explicitly spoken on the subject was meaningless.[113]

2. *The "Take Title" Alternative*

In comparison, the Court spent little time in determining that the "take title" provision, standing alone, would be unconstitutional. The Court compared this alternative to "a congressionally compelled subsidy from state governments to radioactive waste producers" and to "an Act of Congress directing the States to assume the liabilities of certain state residents."[114] However, even if these analogies are correct, the Court's finding that "[e]ither type of federal action would 'commandeer' state governments into the service of federal regulatory purposes"[115] does not necessarily follow from the framework that the Court had previously established. The Court's framework expressed concern only that the federal government could not direct state governments to enforce regulations and did not find that the federal government could not directly compel states to follow federal regulation.[116] In fact, that is precisely the type of action which the Court upheld in *Garcia*.[117]

VI. FUTURE RAMIFICATIONS OF THE COURT'S DECISION

It is unclear at this point what effect the Court's decision will have on this area of constitutional jurisprudence. Certainly, the decision did not cut a wide swath in the Court's Tenth Amendment jurisprudence. While the opinion often speaks in very broad language, the actual holding is extremely narrow. First, Congress cannot compel the states to enforce a federal regulatory scheme.[118] Second, Congress cannot "encourage" the states to enforce a federal regulatory scheme unless the alternative to enforcing the scheme is constitutionally permissible.[119]

761–62) (citations omitted) (emphasis omitted).

[113] *New York*, 112 S. Ct. at 2442 (White, J., dissenting). Justice White also criticized the Court's selective use of history from the Constitutional Convention while ignoring subsequent historical changes in the structure of the federal government. *Id.* at 2444 n.3.

[114] *Id.* at 2428.

[115] *Id.*

[116] *See id.* at 2435.

[117] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[118] *See New York*, 112 S. Ct. at 2428.

[119] *Id.*

Therefore, future application of this holding will, to a large extent, depend on what types of alternatives the Court determines to be impermissible. In this case, the Court drew a very thin line between permissible and impermissible alternatives. The Court had no problem upholding the provision authorizing sited states to eventually deny access to radioactive waste generated in unsited states.[120]

In essence then, the Court found it permissible for Congress to direct states to enforce a federal regulatory scheme or to cease producing radioactive waste within their borders. However, the Court found that Congress had "crossed the line distinguishing encouragement from coercion"[121] when it directed the states to "take title" to radioactive waste in lieu of enforcing a federal regulatory scheme.[122] Looking at these two provisions side by side, it does not seem that the Court will find many alternatives to be impermissible. Hence, the Court's holding will likely have very limited applicability.

VII. CONCLUSION

The Court's decision in *New York v. United States* has added another player to this already confused area of constitutional jurisprudence. It is unclear at this point what impact, if any, this decision will have. However, it is quite certain that this debate is far from settled.

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120 *Id.* at 2427. *See supra* notes 77–83 and accompanying text.

121 *Id.* at 2428.

122 *Id.*